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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

R&J CONSTRUCTION, INC., Plaintiff and Appellant, v. PERRY ABADIR, Defendant and Respondent.	A153301, A154101 (Contra Costa County Super. Ct. No. C1601542)

R&J Construction, Inc. (R&J) appeals from a dismissal entered after respondent's demurrer to R&J's second amended complaint was sustained without leave to amend. R&J contends its contract claims are not time-barred and other causes of action were sufficiently alleged. R&J also appeals from an order awarding respondent attorney fees, contending the fees were unreasonable and improperly compensated respondent for fees incurred in defending against tort claims. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

After respondent Perry Abadir failed to pay for some services rendered by R&J, the parties signed promissory notes by which Abadir would pay off the debt in monthly installments until the notes were paid in full. Abadir made no payments after March 2011, with substantial principal remaining.

A. Original Complaint

In August 2016—over five years after Abadir's last payment—R&J sued Abadir for breach of contract, breach of the implied covenant of good faith, and common counts.

Abadir demurred on the ground that the causes of action were time-barred. The court sustained the demurrer with leave to amend.

B. First Amended Complaint

R&J's first amended complaint added claims for intentional and negligent misrepresentation, along with allegations that Abadir repeatedly said he would make payments on the notes and that R&J would not have executed the notes or refrained from suing Abadir if it had known the extent of his financial problems and intent not to pay. Abadir filed a demurrer to the first amended complaint on the ground that claims were time-barred and no cause of action was stated. The court sustained the demurrer with leave to amend.

C. Second Amended Complaint

R&J's second amended complaint added counts for promissory estoppel and equitable estoppel based on Abadir 's alleged representations that he would start making payments. Because the second amended complaint is the operative pleading for purposes of this appeal, we set forth its allegations in greater detail.

1. Allegations

Beginning in 2005, R&J and Abadir had an extensive business relationship in which R&J performed services for Abadir and Abadir paid R&J for those services. R&J therefore trusted Abadir and believed he would repay any debt he incurred.

In December 2009, after Abadir failed to pay for some of R&J's work, the parties signed three promissory notes totaling $337,559.91. Abadir allegedly represented that he was willing and able to pay the notes, although he also disclosed that he was going through a divorce and had difficulty making payments toward the underlying contracts.

The first promissory note (Note 1) was signed on December 21, 2009, for $8,054.24, with monthly payments of $710 due on the 25th of each month beginning January 25, 2010. Abadir first breached Note 1 when he did not make a payment on that date. From February 2, 2010 to March 2, 2011, Abadir made 10 sporadic payments totaling $7,100, with no payments thereafter. The remaining principal is $954.24.

The second promissory note (Note 2) was signed on December 31, 2009, for $14,914.21, with monthly payments of $1,340 due on the 25th of each month beginning on January 25, 2010. Abadir first breached Note 2 when he did not make a payment on that date. From February 2, 2010, to March 2, 2011, Abadir made 10 sporadic payments totaling $13,400, with no payments thereafter. The remaining principal is $1,514.21.

The third promissory note (Note 3) was also signed on December 31, 2009, for $314,591.46, with monthly payments of $28,100 due on the 25th of each month beginning on February 25, 2010.[1] Abadir made no payments.

On June 11, 2013, Abadir and R&J's president (Wood) had a phone conversation in which Abadir promised Wood that a lawsuit was not needed, acknowledged the outstanding debt, said "I will start paying you," and promised that if given more time to resolve his financial and tax issues, he would "thereafter re-commence repayment of the Notes." Abadir explained that he had lost "almost everything," he had a 1.1 million dollar judgment against him, the IRS was pursuing a claim against him because his accountant committed fraud, and he would start paying R&J after his tax issues resolved in 90–120 days.

In early November 2014, Wood and Abadir had a conversation in which Abadir acknowledged his debt and "expressly promised Wood that he would begin repaying the debt under the Notes." In purported reliance on Abadir's representations, R&J did not file a lawsuit and instead wrote a letter to Abadir on November 18, 2014, requesting repayment of the loans. According to the second amended complaint, it was only after Abadir failed to respond to the letter that R&J became aware of Abadir's lack of intent to repay and realized his words, conduct, and promises to pay were untrue.

Based on these and related allegations, R&J asserted counts for breach of contract on Note 1, breach of contract on Note 2, breach of contract on Note 3, breach of the

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[1] Paragraph 19 of the second amended complaint alleges that the first payment on Note 3 was due on February 25, 2010. Paragraph 42 alleges it was due on January 25, 2010. Note 3, attached as an exhibit to the second amended complaint, confirms it was February 25, 2010.

implied covenant of good faith and fair dealing, a common count for an open book account, intentional misrepresentation, negligent misrepresentation, promissory estoppel, and equitable estoppel.

2. Abadir's Demurrer and Trial Court's Order

Abadir filed a demurrer to the second amended complaint on the ground that some claims were barred by the statute of limitations and the allegations did not state any cause of action. R&J opposed the demurrer solely as to the statute of limitations, making a new argument that certain language in the Notes constituted a waiver of the statute.

The court sustained the demurrer without leave to amend. An "Order Dismissing Action" was filed on November 29, 2017, which provided that "Defendant may submit an appropriate form of judgment, and may seek costs in ordinary course." No separate judgment appears in the record, but notice of the Order Dismissing Action was filed on December 4, 2017, and R&J filed a notice of appeal from the "judgment of dismissal" entered on December 4, 2017 (appeal number A153301). We will construe the Order of Dismissal as the judgment for purposes of appeal.

D. Order Awarding Attorney's Fees

Meanwhile, Abadir filed a motion for attorney fees in December 2017. Over R&J's objections, the court awarded Abadir attorney's fees in the amount of $67,830. R&J filed a notice of appeal from this order (appeal number A154101). We granted the parties' request to consolidate R&J's appeals.

II. DISCUSSION

A. Order Sustaining Demurrer Without Leave to Amend

"In our de novo review of an order sustaining a demurrer, we assume the truth of all facts properly pleaded in the complaint or reasonably inferred from the pleading, but not mere contentions, deductions, or conclusions of law. [Citation.] We then determine if those facts are sufficient, as a matter of law, to state a cause of action under any legal theory." (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.) To prevail on appeal from an order sustaining a demurrer, the appellant must affirmatively demonstrate error by showing that the facts pleaded are sufficient to

establish every element of a cause of action and overcome all legal grounds on which the demurrer could have properly been sustained. (*Ibid*.)

1. Contract Claims (Counts 1–4)

Counts 1–4 purport to allege causes of action for breach of each of the three Notes and breach of the implied covenant of good faith and fair dealing. The limitations period for an action based on contract or other written instrument, as relevant here, is four years. (Code Civ. Proc., § 337, subd. (a).) The four-year period ordinarily begins to run at the time of breach. (*Reichert v. General Ins. Co*. (1968) 68 Cal.2d 822, 831.)

Here, the second amended complaint alleged that a breach of Notes 1 and 2 initially occurred when Abadir failed to pay in January 2010, that some payments were made through March 2, 2011, and that no payments were made thereafter. Because partial payments on a note restart the limitations period (Code Civ. Proc., § 360), and the payments due on and after March 25, 2011 were not made, the limitations period as to Notes 1 and 2 expired on March 25, 2015. As to Note 3, the second amended complaint alleged that a breach occurred on February 25, 2010, and no payments were ever made, so the limitations period expired on February 25, 2014. R&J did not file its complaint until August 2016, so R&J's contract claims are time-barred.

To avoid dismissal, R&J had to allege facts from which it might be inferred that the limitations period was tolled or does not apply. (See *Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174–175.) R&J argues a waiver and estoppel.

a. Waiver

To allege a waiver of the statute of limitations, R&J had to plead facts showing that Abadir intentionally relinquished a known right to assert a defense based on the statute. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd*. (1994) 30 Cal.App.4th 54, 59–60 (*DRG/Beverly Hills*).) Such a waiver must be in writing and signed by the person obligated. (Code Civ. Proc., § 360.5.) A waiver would operate for a period of four years after the expiration of the four-year limitations period, extending the filing deadline such that R&J's complaint would be timely. (Code Civ. Proc., § 360.5.)

Abadir's second amended complaint does not state facts from which any written waiver may be inferred. Nowhere in the second amended complaint is there any allegation that the parties agreed to waive the statute of limitations, or even discussed it.

R&J instead refers us to isolated language in the Notes, which were attached to the second amended complaint. It first points to a provision stating that "[t]he unpaid principal and interest shall be payable in monthly installments of $ [amount], beginning on [date] and *continuing until paid in full*." (Italics added.) However, an agreement that Abadir was supposed to keep paying until the debt was satisfied cannot reasonably be construed to mean that, if Abadir failed to do so, R&J could wait until after the four-year limitations period to sue him.

R&J also urges that the Notes state no "delay in enforcing any right of the Lender under this Note . . . shall affect the liability of the Borrower." Actually, the sentence reads: "No renewal or extension of this Note, delay in enforcing any right of the Lender under this Note, or assignment by Lender of this Note shall affect the liability of the Borrower."

Again, the quoted language says nothing about the statute of limitations, let alone that Abadir was waiving it. In context, the provision's plain meaning is that Abadir would remain obligated by the Note to pay the amounts due, even if R&J extended or assigned the Note or delayed in enforcing its rights under the Note. The provision cannot reasonably be construed to mean that Abadir was giving up the right to object to R&J suing him after the expiration of a limitations period to which the Note did not refer.

R&J argues that the second amended complaint contains allegations about the circumstances in which the Notes arose, such as the parties' relationship and the purpose of the Notes to allow payment over time. Even those allegations, however, fail to indicate that Abadir knew there was a statute of limitations that he could use to defend against a collection lawsuit, yet intentionally relinquished it.

b. Equitable Estoppel

R&J contends that Abadir, by his words and conduct, is estopped from asserting a statute of limitations defense. Four elements must ordinarily be present to apply the

doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (*DRG/Beverly Hills, supra,* 30 Cal.App.4th at p. 59.)

R&J insists that it alleged the elements of estoppel. But it ignores the fact that an estoppel to assert the statute of limitations has a limited duration, ending when the inducement for delaying the filing of the lawsuit has ceased to operate. (*Regus v. Schartkoff* (1957) 156 Cal.App.2d 382, 387.) Thus, if the circumstances inducing delay ceased while there was still time to file a lawsuit before the end of the statutory period, R&J cannot insulate its failure to do so on the ground of estoppel. (*Derose v. Carswell* (1987) 196 Cal.App.3d 1011, 1026; *Lobrovich v. Georgison* (1956) 144 Cal.App.2d 567, 573–574 (*Lobrovich*); *Santee v. Santa Clara County Office of Education* (1990) 220 Cal.App.3d 702, 716 (*Santee*).) And if the inducement to delay filing suit proved false after the limitations period has expired, R&J had to proceed diligently to initiate the litigation. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384.)

R&J alleges that it realized Abadir did not intend to pay the Notes after he refused to respond to R&J's November 18, 2014 letter by the deadline of December 1, 2014. At that point, there was still three months before the limitations period expired as to Notes 1 and 2 in March 2015. As a matter of law, three months was more than enough time to bring suit. (*Lobrovich, supra,* 144 Cal.App.2d at pp. 573–574 [where conduct giving rise to the estoppel ceased five weeks before the end of the limitations period, plaintiff had sufficient time to institute an action]; *Santee, supra,* 220 Cal.App.3d at p. 716 [estoppel did not apply because two months was ample time to file a claim before expiration of the statutory period].)

As to Note 3, the limitations period ended in February 2014. By the time R&J allegedly realized in December 2014 that Abadir was not going to pay, the period had expired. But R&J did not diligently proceed to file its complaint, waiting a whopping 21 months until August 2016. Despite R&J's conclusory allegation that it brought suit

within a "reasonable" time, it provides no legal authority for the proposition that a 21-month delay was reasonable under the alleged circumstances.

The court did not err in sustaining the demurrer as to R&J's causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing.

2. Common Count: Open Book Account (Count 5)

Count 5 of the second amended complaint asserted a claim based on an open book account. R&J, however, made no effort to justify this claim in opposition to Abadir's demurrer, and it makes no such effort here. R&J fails to establish error.

3. Intentional Misrepresentation (Count 6)

To plead a fraud cause of action, a plaintiff must allege a misrepresentation, knowledge of falsity, intent to defraud or induce reliance, justifiable reliance, and resulting damage. (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 845.) To survive a demurrer, these elements must be alleged with specificity. (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614.)

a. Alleged December 2009 Misrepresentation

R&J alleged that Abadir promised in 2009 to pay the notes but had no intention to perform. These allegations are unavailing as to Notes 1 and 2, because Abadir did, in fact, make numerous payments on those notes, contradicting the assertion that he intended not to.

Moreover, any fraud claim based on the December 2009 promise is time-barred. The limitations period for fraud is three years. (Code Civ. Proc., § 338, subd. (d).) That period expired in December 2012, long before R&J filed its lawsuit in August 2016.

R&J argues that the limitations period for fraud claims does not begin to run until the fraud is *discovered* (Code Civ. Proc., § 338 subd. (d)), and the second amended complaint alleged that R&J did not discover Abadir's fraud until after December 1, 2014. To rely on this theory, however, R&J had to plead *facts* showing that it could not have discovered Abidar's fraud, with reasonable diligence, until at least August 2013, three years before it filed suit. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462,

1472 [plaintiff must plead " 'facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry' "].)

R&J fails to do so. Its allegation that it "could not have known the true facts" due to Abadir's "prior history of repayment and extensive assets known to [R&J]" is vague, conclusory, and therefore insufficient. It is also a non-sequitur: while the parties' past relationship might have been what led R&J to be unduly lax about pursuing the matter, it does not mean that R&J lacked the means of discovering Abadir's intent. Moreover, R&J's contention rings hollow in light of R&J's other allegations: R&J knew Abadir had financial problems when the notes were signed in 2009, knew Abadir never made any payment on Note 3 (for $314,591.46), and knew Abadir stopped paying on Notes 1 and 2 in March 2011, yet there was no alleged inquiry by R&J from December 2009 to the expiration of the limitations period in December 2012, other than R&J leaving telephone messages that Abadir ignored.

b. Alleged June 2013 Misrepresentations

R&J alleged that in June 2013 Abadir orally acknowledged his debt, promised to start paying again, and disclosed his financial woes. We question whether these allegations state any misrepresentation on which R&J could *reasonably* rely, in light of R&J's allegations that Abadir had not paid a penny for over two years and specifically told R&J that he had lost almost everything, a $1.1 million judgment was entered against him, and the IRS was after him as well.

For the purposes of demurrer, however, the fatal flaw in R&J's allegations pertains to the element of resulting damage. R&J alleged that Abadir's June 2013 promise to pay induced R&J not to file a lawsuit by the end of the limitations period in February 2014 (Note 3) and March 2015 (Notes 1–2). But R&J's other allegations show otherwise. According to the second amended complaint, Abadir said he would begin to pay after resolving his tax matters in 90–120 days, which would be roughly October 2013. Abadir never made any such payment, so by November 2013 it was apparent that Abadir was not following through on his promise. Because R&J still had until February 2014 and March

2015 to file a lawsuit, as a matter of law Abadir's June 2013 statement was not the proximate cause of R&J's failure to file a timely complaint.[2]

c. Alleged November 2014 Misrepresentations

Lastly, R&J alleged that Abadir promised in November 2014 to start paying on the notes again. It did not allege, however, any amount Abadir promised to pay, when he would start paying, how frequently he would pay, or any other indicia of an actionable promise. To the contrary, the second amended complaint alleged that Abadir told R&J they "needed to work out a solution." It further alleged that the parties' conversation was "reflected" in a letter R&J sent to Abadir on November 18, 2014, but that letter, attached as an exhibit to the second amended complaint, clearly shows that Abadir made no definite promise to pay: the letter laments that Abadir was "not explicit in [the] conversation," R&J "would like to know what [Abadir's] ideas are and what solution [Abadir is] offering," and R&J wanted to resolve the matter by the end of the year. (See *SC Manufactured Homes, Inc. v. Liebert* (2008 162 Cal.App.4th 68, 83 [on demurrer, if allegations are inconsistent with unambiguous exhibits, the exhibits are accepted as true].)

In any event, R&J failed to allege resulting damage. The limitations period expired as to Note 3 in February 2014, so the November 2014 promise could not have induced R&J to miss the deadline—it had already passed. As to Notes 1 and 2, the limitations period did not expire until March 2015, so R&J had months to timely file suit after it realized in December 2014 the falsity of the November 2014 promise. R&J fails to establish that the trial court erred in sustaining the demurrer as to its cause of action for intentional misrepresentation.

4. Negligent Misrepresentation (Count 7)

For its negligent misrepresentation claim, R&J relied on the same alleged false promises that it cited in its intentional misrepresentation claim. The infirmities in the intentional misrepresentation claim apply to this claim as well. More fundamentally, as a

[2] A fraud claim based on Abadir's June 2013 statements is also time-barred, since the statements were made over three years before R&J filed its lawsuit in August 2016.

matter of law, allegations of a false promise do not support a claim for negligent misrepresentation. (*Tarmann v. State Farm Mut. Auto. Ins. Co*. (1991) 2 Cal.App.4th 153, 158-159.) The trial court pointed this out, and R&J offers no rebuttal or explanation for its decision to include a claim for which there is no legal basis. Count 7 is frivolous, and the court did not err in sustaining the demurrer.

5. Promissory Estoppel (Count 8)

For its eighth count, R&J asserted promissory estoppel, which requires allegations of a clear and unambiguous promise, reasonable and foreseeable reliance on the promise by the party to whom the promise was made, and injury caused by that reliance. (*Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 225 (*Aceves*).) Essentially, the promise will be enforced if needed to avoid injustice. (*Advanced Choices, Inc. v. State Dept. of Health Services* (2010) 182 Cal.App.4th 1661, 1671–1672.)

For the promise to be sufficiently unambiguous, it must be such that a court can determine the scope of the promised duty and a rational basis for assessing damages. (*Aceves, supra,* 192 Cal.App.4th at p. 226.) A preliminary discussion or negotiation does not suffice. (*Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, 1044.) Here, in June 2013 Abadir allegedly acknowledged the debt and said he would start paying after 90-120 days, but he did not say exactly when the payments would begin, in what amount, or how frequently payment would be made. Abadir's alleged November 2014 promise to begin repaying did not mention any specifics and, as discussed *ante*, is shown by R&J's November 2014 letter to be merely preliminary and uncertain. R&J failed to allege any basis for promissory estoppel.

6. Equitable Estoppel (Count 9)

For its ninth and final count, R&J purported to assert a claim for equitable estoppel. As the trial court pointed out, however, there is no such thing as a cause of action for equitable estoppel. (*Behnke v. State Farm General Ins. Co*. (2011) 196 Cal.App.4th 1443, 1463.) Count 9 is therefore frivolous.

R&J has not established that the allegations of its second amended complaint stated any viable cause of action, and the court did not err in sustaining the demurrer.

7. Leave to Amend

On appeal from a demurrer sustained without leave to amend, the plaintiff must show how its pleading could be amended to state a cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Here, R&J has not explained, either in the trial court or in its appellate briefs, how it might amend its second amended complaint to cure the defects and state a cause of action. We find no reasonable possibility that it can. The court did not abuse its discretion in denying leave to amend.

B. Order Granting Attorney's Fees

A defendant who obtains a dismissal of the claims against him is a prevailing party entitled to recover costs. (Code Civ. Proc., § 1032, subd. (a)(4), (b).) Costs include attorney fees when such recovery is authorized by contract, statute, or law. (Code Civ. Proc., § 1033.5, subd. (a)(10).)

Here, each Note provides for an award of attorney fees: "If any payment obligation under this Note is not paid when due, the Borrower promises to pay all costs of collection, including reasonable attorney fees, whether or not a lawsuit is commenced as part of the collection process." Although the provision purported to require only Abadir to pay attorney fees to R&J, unilateral fee provisions are deemed to provide for reasonable attorney's fees to the prevailing party, whoever it is. (Civ. Code § 1717, subd. (a); *Xuereb v. Marcus and Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342 (*Xuereb*).)

R&J challenges the award on two grounds, neither of which has merit.

1. Fees for Tort Claims

R&J argues that Abadir cannot recover attorney's fees for work performed solely on non-contractual causes of action. (*Xuereb, supra,* 3 Cal.App.4th at p. 1342; *Santisas v. Goodin* (1998) 17 Cal.4th 599, 615; *Gil v. Mansano* (2004) 121 Cal.App.4th 739, 742–743.) It claims that its causes of action for breach of the duty of good faith and fair dealing and open book account are not really contractual claims, the first and second amended complaints alleged tort claims for intentional and negligent misrepresentation, and its claims for promissory estoppel and equitable estoppel actually sound in tort. R&J admits that it is "impossible from the invoice records to determine what percentage of

work was performed related to these causes of action," but declares without support that "at least 90% of the fees claimed for the demurrers to the First and Second Amended Complaints should be stricken as related to claims for which no attorneys' fees are recoverable."

R&J's argument is meritless. Attorney fees may be awarded under Civil Code section 1717 as to all claims for relief, even though some sound in tort and others in contract, when the claims are so intertwined that it would be impracticable or impossible to separate the two. (E.g., *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 686–687; *Brown Bark III, LP v. Haver* (2013) 219 Cal.App.4th 809, 829–830.) Whether to allocate fees is within the discretion of the trial court. (*Abdallah v. United States Savings Bank* (1996) 43 Cal.App.4th 1101, 1111.)

Here, R&J's original complaint contained four claims directly based on contract (claims on the notes and breach of the implied covenant) and two common counts ("account stated" and "open book account") for which the gravamen was also breach of contract. (See *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 970.) In its first amended complaint, R&J added claims for intentional and negligent misrepresentation, but those tort claims were based on the same allegations that R&J had asserted when attempting to evade the statute of limitations on its contract claims; as such, it is reasonable to conclude that those claims did not add any appreciable fees and were inextricably intertwined with R&J's contract claims. The second amended complaint added new causes for promissory estoppel and equitable estoppel, but these claims were also based on the same allegations of misrepresentation. No cause of action sought relief other than amounts due under the notes.

In issuing its attorney fee award, the trial court explained as follows: "*At base, however, all of plaintiff's pleaded theories were fundamentally contractual in nature*. The alleged misrepresentations, for example, were misrepresentations (made after the original notes), as to defendant's intentions or ability to repay the notes. The estoppel theory was promissory estoppel, meaning continuing promises to pay the notes. All of plaintiff's claims have in common that none of them would have existed without the

underlying notes, and all of them were simply different legal wrappings for the baseline attempt to collect on the notes. Accordingly, they must be treated as contractual in character for purposes of [Civil Code] § 1717." The court did not abuse its discretion. (See *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 37 [where bank sued on a note and the debtor cross-complained for fraud, it was error to allocate fees between the contract and fraud claims because the bank had to prevail on the fraud claim to recover on its note, making the contract and fraud claims interrelated]; *Abdallah, supra,* 43 Cal.App.4th at p. 1111.)[3]

2. Windfall

R&J also contends the attorney's fee award was "grossly inequitable," a "windfall," and not "reasonable." Specifically, it urges that Abadir's obtaining a dismissal was "egregious" enough given his "contribution" to the running of the statute of limitations, and adding the fee award "exceeds the bounds of common reason and decency to the point that the award shocks the conscience." We review the trial court's order for an abuse of discretion. (*Dove Audio Inc. v. Rosenfeld Meyer and Susman* (1996) 47 Cal.App.4th 777, 785.)

Although Abadir apparently never paid his debt to R&J, it is also true that R&J decided not to bring a lawsuit until years after the statute of limitations barred its right to recover for Abadir's nonpayment. When R&J did finally press its time-barred complaint, Abadir incurred attorney fees defending against it; when R&J presented its first amended complaint, Abadir incurred more attorney fees; and when R&J pursued its second amended complaint, Abadir incurred yet more fees. As a matter of law, not one of R&J's claims survived demurrer, and at least two are frivolous. Far from a windfall, the order awarding attorney fees merely allowed Abadir to recoup the costs of defending against R&J's meritless pleadings.

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[3] R&J contends that we should review de novo whether the fee award includes fees that are not recoverable under Civil Code section 1717. Even if de novo review was appropriate, we would conclude the trial court did not err.

R&J argues in its reply brief that "it defies logic and equity to award contractual attorneys' fees based upon an unenforceable contract," because "[i]f the contract is unenforceable for the purposes of recovery of the contract amount, so too must it be unenforceable for the purposes of recovery of attorneys' fees to recover that amount." R&J misunderstands. It is not that each Note is void and a nullity, but that R&J tried to enforce those contracts when our legislature has deemed it can no longer do so. Because R&J repeatedly *claimed* the Notes were enforceable when they were not, the fee award was consistent with equity and logic.[4]

III. DISPOSITION

The judgment is affirmed.

[4] R&J asserts in its reply brief that the "specific language of the Notes only permits recovery of attorneys' fees incurred as 'costs of collection,' [and] does not include attorneys' fees for any other claim relating to breach of contract, nor any tort related to the contract." An argument raised for the first time in a reply brief is generally not considered. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489.) At any rate, the argument is meritless.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.